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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

THOMAS EDWARD NEVIS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether It Was Error For The Ninth Circuit Court of Appeals to Deny Petitioner's Motion For Certificate of Appealability Under The Anti-Terrorism and Effective Death Penalty Act When Petitioner Made A Substantial Showing Of The Denial Of A Constitutional Right And Was Therefore Entitled To Bring The Appeal.

PARTIES TO THE PROCEEDING

The parties to the proceeding are the United States of America and Thomas Edward Nevis.

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The Order of the United States Court of Appeals for the Ninth Circuit, dated May 15, 1998, denying Petitioner's Motion for Certificate of Appealability, appears as Appendix A. The order of the United States Court of Appeals for the Ninth Circuit dated February 6, 1998, remanding the case to the district court for the limited purpose of granting or denying a Certificate of Appealability as Appendix B. The Order of the United States Court of Appeals for the Ninth Circuit dated October 30, 1997, remanding the case to the district court for the limited purpose of granting or denying a Certificate of Appealability appears as Appendix C. The Opinion of the United States Court for the Eastern District of California dated August 15, 1997, denying petitioner's motion pursuant to section 2255 appears as Appendix D.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. section 2255 and Rule 13 of the Rules of the Supreme Court.

CONSTITUTIONAL PROVISIONS

The Fifth Amendment guarantees:

"No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . . nor be deprived of life, liberty, or property, without due process of law."

The Sixth Amendment guarantees:

"In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense."

STATUTORY PROVISIONS

The Anti-Terrorism and Effective Death Penalty Act (ATEDP) as it pertains to this case is contained in 28 U.S.C. section 2253 and is as follows:

In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

* * *

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the Court of Appeals from –

* * *

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if applicant has made a substantial showing of the denial of a constitutional right. . . .

INTRODUCTION

In his section 2255 petition, Petitioner alleged that both his trial and appellate counsel were ineffective because they did not attack the underlying validity of the criminal restitution orders lodged against him. These orders are illegal considering the existence of an underlying civil settlement of all claims, thereby waiving the issues.

Petitioner's statement of this claim was adequate to meet his burden under the ATEDP Act of a substantial showing of the violation of a federal right. He should have been issued a Certificate of Appealability by the Ninth Circuit Court of Appeals.

STATEMENT OF FACTS

This appeal arises from an order of the U.S. District Court for the Eastern District of California denying a section 2255 motion.

Petitioner, a real estate developer, was convicted in May of 1989 in the U.S. District Court for the District of Oregon of 24 criminal charges. A civil suit regarding those same losses was also pending against him. On July 24, 1989, Petitioner signed both civil and criminal stipulations with the government and the Federal Savings and Loan Insurance Corporation (FSLIC), pursuant to the Witness Victim Protection Act of 1982 (VWPA) (18 U.S.C. sections 3556, 3663, 3664).

Petitioner was sentenced to a prison term by the Oregon court, which also issued an Order of Restitution

pursuant to the VWPA, ordering Petitioner to pay $2 million restitution or go to jail.

After being released on probation, Petitioner was unable to pay his $400,000 yearly restitution. The case was then transferred to the Eastern District of California at Sacramento. The Sacramento probation office filed a Petition for Revocation of Probation, alleging that Petitioner willfully failed to pay restitution.

At a probation revocation hearing held on September 14, 1995, hearing counsel made no argument challenging the validity of the criminal restitution order made pursuant to provisions of the VWPA, which prohibits criminal restitution in cases where a voluntarily executed agreement constituted full and immediate restitution of all claims.

Petitioner was found to be in violation of his probation on September 14, 1995 by the Sacramento District Court. The Sacramento court issued its own Order of Restitution, ordering Petitioner to pay $2 in restitution and sentencing him to another prison term.

Petitioner appealed the revocation and his appellate counsel also failed to object to the legality of the criminal restitution orders, or to the waiver of those issues by hearing counsel. The Ninth Circuit Court of Appeals affirmed on December 16, 1996.

On February 3, 1997, Petitioner filed a petition for writ of habeas corpus pursuant to section 2255, alleging, *inter alia*, ineffective assistance of counsel, and that criminal restitution was impermissible. The motion was denied on August 15, 1997.

Petitioner appealed to the Ninth Circuit Court of Appeals on August 17, 1997. The Ninth Circuit instructed the Eastern District Court to rule on the issuance of a Certificate of Appealability in an order dated October 30, 1997. The district court did not receive the order and the Ninth Circuit reissued the order in February 6, 1998. In the meantime, Petitioner filed a motion for issuance of the Certificate in the Ninth Circuit, and attempted to file his opening brief in the appeal. On May 15, 1998, the Ninth Circuit issued an order denying Petitioner's request for a certificate of appealability.

REASONS FOR GRANTING WRIT

IT WAS ERROR FOR THE NINTH CIRCUIT COURT OF APPEALS TO DENY PETITIONER'S MOTION FOR A CERTIFICATE OF APPEALABILITY UNDER THE ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT WHEN PETITIONER MADE A SUBSTANTIAL SHOWING OF THE DENIAL OF A CONSTITUTIONAL RIGHT AND WAS THEREFORE ENTITLED TO BRING THE APPEAL.

The right to bring a habeas corpus petition to challenge the legality of a sentence is still enjoyed under 28 U.S.C. sections 2253, et seq. Indeed, that section states that "a final order *shall* be subject to review on appeal by the court of appeals" so long as the "applicant has made a substantial showing of the denial of a constitutional right."

In his *pro per* section 2255 petition, Petitioner alleged that his counsel was ineffective for failing to examine "all of the facts, circumstances, pleadings and laws which

related to the restitution order." Although sparingly stated, this argument contains all of the ingredients for a "substantial showing."

The question that must be asked is: was it reasonable for counsel to ignore arguments concerning the underlying orders of restitution? Any reasonably prudent counsel who had carefully examined all the ramifications of the various orders, stipulations and sentences would have discovered that the VWPA has specific provisions which anticipate exactly the situation which existed in Petitioner's case.

The claims against Petitioner were at issue and settled by agreement in the civil case. Under the VWPA, no court can order restitution which carries criminal penalties under such circumstances. An attempt to do so was soundly condemned in *United States v. Coleman*, 997 F.2d 1101, 1106-1107 (5th Cir. 1993), *cert. denied*, 510 U.S. 1077 (1994). *Coleman* held that where the restitution order is contemplated under the VWPA, a court cannot order restitution where the claims arising from transactions for which defendants were criminally prosecuted were at issue and settled by agreement in the civil case. *Id.*, at 1106. To attempt to use the power of the court to enforce its civil judgment by hanging the threat of imprisonment over Petitioner's head was criticized as making an "end run around the criminal justice system . . . fostered by (the government) in this case . . . in the use of the VWPA."

All of these necessary ingredients under *Coleman* were present herein and easily discernible to the reasonably prudent counsel. And since the stipulations form the bedrock of the case, they begged to be examined in light of their application to Petitioner's sentence.

Simply put, if the law prohibits punishing a defendant criminally with loss of freedom once he has been punished civilly for the same offense, then any such punishment is illegal.

Moreover, the motions, files and records in this case do not conclusively show that Petitioner is entitled to no relief . . . 28 U.S.C. section 2255, *United States v. Simmonds*, 111 Fed. 736, 737 (10th Cir. 1997); *United States v. Galloway*, 56 F.3d 1239 (10th Cir. 1995). The subject of ineffective assistance was never fully fleshed out by the district court.

This Court's holding in the seminal case of *Strickland v. Washington*, 466 U.S. 668 (1984) compels us to permit examination of Petitioner's ineffective assistance of counsel claim, as this right forms the foundation of our civil liberties. Did Petitioner's counsels' failure to address the issue of the legality of the underlying orders deprive him of a fair proceeding, a proceeding whose result is unreliable? *Id.*, at 687. We must answer "yes" to this question if we can see that there is a compelling probability that, but for counsels' lack of foresight in examining this issue, the end result for Petitioner would have been vastly different: his present sentence would have been declared illegal and he would not now be incarcerated.

CONCLUSION

Petitioner has clearly met his burden of a substantial showing that a constitutional right has been denied. For these reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

DATED: August 12, 1998

Respectfully submitted,

ELAINE MORINELLI
Attorney for Petitioner
Thomas Edward

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. THOMAS EDWARD NEVIS, Defendant-Appellant.	No. 97-16755 DC# CV-97-203-DFL CR-94-169-DFL Eastern California (Sacramento) ORDER

(Filed May 15, 1998)

Before: TROTT and FERNANDEZ, Circuit Judges

The request for a certificate of appealability is denied. *See* 28 U.S.C. § 2253(c)(2).

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. THOMAS EDWARD NEVIS, Defendant-Appellant.	No. 97-16755 DC# CV-97-203-DFL Eastern California (Sacramento) ORDER

(Filed Feb. 6, 1998)

On October 30, 1997, this court issued an order remanding this case to the district court for the limited purposed of granting or denying a certificate of appealability.

It appears that the district court did not receive the October 30, 1997 order.

Accordingly, the Clerk shall serve on District Judge David F. Levi a copy of the October 30, 1997 order along with this order.

For the Court

/s/ Song Hill
Song Hill
Motions Attorney/Deputy Clerk
9th Cir. R. 27-7
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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. THOMAS EDWARD NEVIS, Defendant-Appellant.	No. 97-16755 DC CV-97-203-DFL Eastern California (Sacramento) ORDER

(Filed Oct. 30, 1997)

Before: Peter L. Shaw, Appellate Commissioner

The district court has not issued or declined to issue a certificate of appealability in this appeal, which appears to arise under 28 U.S.C. § 2255. Accordingly, this case is remanded to the district court for the limited purpose of granting or denying a certificate of appealability at the court's earliest convenience. *See* 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b); *United States v. Asrar*, 108 F.3d 217, 218 (9th Cir. 1997).

If the district court issues a certificate of appealability, the court should specify which issue or issues meet the required showing. *See* 28 U.S.C. § 2253(c)(3); *Asrar*, 108 F.3d at 218. Under *Asrar*, if the district court declines to issue a certificate, the court should state its reasons why a certificate of appealability should not be granted, and the clerk of the district court shall forward

to this court the record with the order denying the certificate. *See Asrar,* 108 F.3d at 218.

/s/ Peter L. Shaw
General Order 6.3(e)

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Respondent, v. THOMAS E. NEVIS, Petitioner.	No. CRS-94-169 DFL CIVS-97-203 DFL *Memorandum of Opinion and Order*

(Filed Aug. 15, 1997)

Thomas E. Nevis has filed a petition to vacate, set aside or correct his sentence under 28 U.S.C. § 2255. The petition was initially filed in pro per. Nevis later obtained counsel, and counsel prepared the traverse to the government's response.

In the petition, Nevis makes three arguments: (1) that the sentence imposed upon revocation of probation was illegal; (2) that he did not receive effective assistance of counsel; and (3) that the restitution order imposed when he was sentenced in 1989 is invalid and therefore unenforceable. In the traverse prepared by counsel, however, Nevis only persists in the third of these arguments. The government requests in its response that the sentence should be corrected as to counts 9, 21, and 25. Nevis joins in this request in the traverse, and the correction will be ordered. The correction does not affect the overall sentence imposed, and no sentencing hearing is required.

Nevis' attack on the sentence following the revocation of probation fails. First, as the government explains in detail at pages 5-10 of its response, Nevis was sentenced by this court, following the decision to revoke probation, on 23 counts as to which sentence had been suspended by Judge Panner. Defendant had been placed on probation on these counts on certain conditions. Thus, when defendant violated the condition that he make restitution, defendant properly was sentenced to a term of imprisonment that could have been imposed by Judge Panner when Nevis was first placed on probation and the sentence was suspended. In short, Nevis was not resentenced to a higher term as to counts on which he had already been sentenced by Judge Panner. This claim is denied, although the judgment and sentence shall be corrected as to counts 9, 21, and 25 as the parties request.

Second, without support or explanation, Nevis claims that counsel was ineffective in his representation. It is not even clear from the petition whether Nevis refers to his counsel at the revocation hearing or to his trial counsel at the time of his conviction and sentencing in 1989. This claim is denied.

Finally, Nevis argues that the restitution order entered by Judge Panner in 1989 as a condition of probation was invalid. The supposed invalidity relates to two stipulations involving restitution that Nevis entered into. First, there was a stipulation in the criminal case between Nevis and the government as to the amount of restitution that should be ordered by the court at the time of sentence. *See* exhibit 1, attachment B to the government's response. The stipulation recites that Nevis, the FSLIC, and the government have agreed to recommend to the

court that Nevis be ordered to pay restitution to the FSLIC in the amount of $2 million. Second, a separate stipulation for entry of judgment was entered into in the civil action brought by the FSLIC against Nevis and others. *See* exhibit 1, attachment A to the government's response. This stipulation between the FSLIC and Nevis provides for the entry of judgment in the amount of some $14 million in favor of the FSLIC with the FSLIC agreeing not to execute on the judgment so long as certain conditions are met. The civil stipulation was to take effect only if Judge Panner entered a restitution order in the criminal case that incorporated the terms of the stipulation in the criminal case. At sentencing, Judge Panner ordered that as a condition of probation Nevis "shall make restitution in the amount of $2,000,000 . . . in accordance with the stipulation."

Relying upon *United States v. Coleman*, 997 F.2d 1101 (5th Cir. 1993), Nevis argues that the restitution order was illegal because all claims involving restitution had been settled as between the FSLIC and Nevis. This claim fails. To begin with, it is not at all clear how this claim can be raised at this late date. Nevis was sentenced in 1989. He appealed the conviction. It does not appear that this argument was raised. Nevis also appealed the order of this court revoking his probation. Again, it does not appear that this argument was raised. Even were the claim timely and cognizable on a petition brought under § 2255, the claim is of no substance. His probation was revoked because he failed to make restitution as ordered as a condition of probation. The stipulations in the civil and criminal case were irrelevant to the revocation. Further, *United States v. Coleman* is not on point. There the

parties had agreed to a civil settlement that independently of any other agreement or court order resolved all of the FDIC's claims for restitution. Because of this independent agreement, the court found that no further restitution order should have issued as part of the criminal sentence. By contrast, in this case the civil stipulation was only effective if Judge Panner ordered criminal restitution in the amount of $2 million. It would be strange indeed to wipe out Nevis' obligation to make restitution as a condition of probation in the criminal case on the theory that the civil stipulation somehow superseded that obligation even though the civil stipulation depended for its very effectiveness on the issuance of the restitution order in the criminal case. This claim is also denied.

For the above stated reasons, petitioner Nevis' motion under 28 U.S.C. § 2255 is GRANTED to the following extent: As to counts 9, 21, and 25, the sentence shall be reduced to two years imprisonment to be served concurrently with each other and concurrently to counts 2, 4, 10, 12, 14, 15, 16, 17, 18, 19, 26, 27, 28, 29, 31, 32, 33, 34, 35, and 36. The clerk shall enter an amended judgment that makes this change as to counts 9, 21, and 25. In all other respects the motion is DENIED.

IT IS SO ORDERED.

Dated: 12 August 1992.

/s/ David F. Levi
DAVID F. LEVI
United States
District Judge